APPENDIX

(Filed, May 25, 1959, Carl W. Reuss, Clerk)

No. 13,870

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PANHANDLE EASTERN PIPE LINE COMPANY, *Petitioner*,

v.

HONORABLE THOMAS P. THORNTON, Judge of the United States District Court for the Eastern District of Michigan, Southern Division, *Respondent*.

On Petition for Writ of Mandamus

Decided May 25, 1959.

Before: MARTIN, Chief Judge, ALLEN and MILLER, Circuit Judges.

MILLER, Circuit Judge. Michigan Consolidated Gas Company (hereinafter referred to as Consolidated), a Michigan corporation, with its principal place of business in Detroit, Michigan, filed a complaint in the United States District Court for the Eastern District of Michigan, Southern Division, against Panhandle Eastern Pipe Line Company (hereinafter referred to as Panhandle), a Delaware corporation, with its principal operating offices and place of business in Kansas City, Missouri. Consolidated's complaint alleged that by reason of Panhandle's refusal over a period of more than six years to

sell gas to Consolidated, which it allegedly had a right to purchase under certain orders of the Federal Power Commission, Consolidated had sustained damages amounting to $17,000,000.00.

Panhandle filed a motion for change of venue pursuant to Sec. 1404 (a), Title 28, U. S. Code, alleging that for the convenience of parties and witnesses and in the interest of justice the case should be transferred to the United States District Court for the Western District of Missouri, Western Division. Panhandle also filed a request for a jury trial. After oral argument and the consideration of briefs filed by the respective parties, the District Judge, by order of April 14, 1959, denied the motion for change of venue. He also handed down a Memorandum Opinion which discussed the question and stated the reasons for the ruling.

On April 28, 1959, Panhandle filed in this Court its petition that a writ of mandamus be issued by this Court (1) directing the District Judge to vacate the order of April 14, 1959, and (2) directing the District Judge to enter an order transferring said case from the United States District Court for the Eastern District of Michigan, Southern Division, to the United States District Court for the Western District of Missouri, Western Division. It states that during the past twenty years it has been involved in numerous controversies with Consolidated which have been contested bitterly before the state and federal courts of Michigan, the Federal Power Commission, the Michigan Public Service Commission, the Common Council of the City of Detroit, and other comparable governing bodies of nearby communities, that in nearly all of these disputes Consolidated has sought and obtained from time to time the active and partisan support of its more than 800,000 customers, as well as the support of various public officials of the state, cities, counties, and other surrounding communities, that the three principal newspapers of the City

of Detroit, as well as newspapers of other smaller nearby communities, have consistently opposed Panhandle and supported Consolidated in its efforts to vilify and discredit Panhandle in the public mind and to defeat it in the legitimate conduct of its business, and that by reason of the resulting bias, prejudice and general hostility toward Panhandle in the minds of a vast majority of the population of the Eastern District of Michigan, it can not obtain a fair trial before an impartial and unbiased jury of that district. Numerous exhibits were filed in support of this contention. Panhandle also contends that the convenience of parties and witnesses will be better served by a trial of this case in the Western District of Missouri, where most of the voluminous records which will be used in the trial of this case are located, than in the Eastern District of Michigan. These contentions had the consideration of the District Judge and were discussed in his Memorandum Opinion in connection with the order herein complained of.

On the general question of the use of the writ of mandamus to review interlocutory orders of the District Court, without regard to Sec. 1404 (a), Title 28, U. S. Code, the United States Supreme Court stated in *Ex Parte Fahey*, 332 U. S. 258, "Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. * * * We are unwilling to utilize them as substitutes for appeals. As extraordinary remedies, they are reserved for really extraordinary causes." See also: *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26. This Court has recently followed these rulings and denied mandamus in cases in which the petitioner sought to review the District Court's ruling on a question of jurisdiction. *Massey-Harris-Ferguson, Ltd.* v. *Boyd*, 242 F. (2) 800, C. A. 6th, cert. denied, 355 U. S. 806; *Allstate Insurance Co.* v. *United States District Court, etc.*, 264 F. (2) 38, C. A. 6th. Although the question of venue is different from the question of jurisdiction, the issues involved in the two types of cases are similar when a review of the District Court's

ruling is sought through a writ of mandamus. In the *Allstate Insurance Company* case we also pointed out that the petitioner had made no showing of having sought relief under the Act of September 2, 1958, 72 Stat. 1770, Sec. 1292 (b), Title 28, U. S. Code. Those rulings are applicable to the present case.

This Court has also recently considered the use of a writ of mandamus to review a ruling of the District Court on a motion for change of venue under Sec. 1404 (a), Title 28, U. S. Code. *Lemon* v. *Druffel*, 253 F. (2) 680, C. A. 6th, cert. denied, 358 U.S. 821. In that case we discussed the question at some length and pointed out that although the Court has the power to review by mandamus proceedings a ruling under Sec. 1404 (a), Congress intended that such power be used only in the exceptional case where there was a clear abuse of discretion or usurpation of judicial power. See also: *In Re Josephson*, 218 F. (2) 174, C. A. 1st, wherein after thoroughly discussing the question, the Court said (at page 183), "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by denying leave to file the petition for a writ of mandamus."

In the present case we are of the opinion that there is no such clear abuse of discretion or usurpation of judicial power in the order of the District Judge as to present the really extraordinary cause in which a writ of mandamus should be used for the purpose of reviewing at the present time the correctness of the interlocutory ruling. *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 383; *Ex parte Fahey*, supra, 332 U. S. 258.

The application for writ of mandamus is denied.

Order Denying Application for Writ of Mandamus

(Filed May 25, 1959)

The application for Writ of Mandamus is denied.

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan corporation, *Plaintiff*,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation, *Defendant*.

Civil Action No. 17703

Memorandum Opinion

The Court has before it defendant's motion for change of venue from the Eastern District of Michigan, Southern Division (Detroit) to the Western District of Missouri, Western Division (Kansas City). This is an action for damages allegedly sustained by plaintiff because of defendant's failure to sell its natural gas to plaintiff. It is alleged in the complaint that defendant's conduct has been in violation of its own tariff schedule, and of the Natural Gas Act. A jury trial has been demanded by defendant. It will be seen that the thrust of defendant's argument stems from the existence of its jury demand. Without it, the motion is deprived of all force.

Our first consideration is, of course, that of jurisdiction. The complaint, paragraph 3, sets forth the following:

> "3. Jurisdiction is vested in this Court for the following reasons:
>
> (a) The action arises under an Act of Congress regulating commerce, (Title 28 U.S.C. § 1337) to-wit: The Natural Gas Act (Title 15 U.S.C. § 717, *et seq.*)

(b) The Natural Gas Act by its terms confers jurisdiction. (Title 15 U.S.C. § 717u)"

The defendant has not put in issue the question of jurisdiction, and the Court finds and concludes that it has jurisdiction of the parties and of the subject matter. Such a determination is not to be confused with the question of venue which *has* been put in issue by defendant. A recent opinion points out that there have been some erroneous concepts in regard to the distinction. Carter v. American Bus Lines, 169 F.Supp. 460 (1959). The motion for change of venue has been brought pursuant to 28 USCA § 1404(a), which reads as follows:

> "'§ 1404 (a). For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been bought."

There is no contention made by defendant that the action has been improperly brought here. Defendant has been admitted to do business in the state of Michigan and it, in fact, does business here. No issue of improper service is made. Plaintiff is a Michigan corporation with its principal place of business in this district, and with its entire business operations within the state of Michigan. Its offices, officials and business records are all kept and maintained here. There is no aspect of abnormality in the choice of forum in this instance by the plaintiff. It is as natural as one can imagine. Defendant advances many of the same reasons practicality-wise for desiring the transfer to its base of operations as we have set forth in pointing up the normaley of plaintiff's choice of forum. In the light of 1404(a) we recognize that we must take into consideration 3 factors in making a determination of the pending motion. Defendant stated this at the oral hearing. Defendant, speaking through its attorney, said:

> "But we have much, much more to sustain this motion than the question of the convenience of the parties

and the convenience of witnesses. We have the interest of justice. That is what I want to address myself chiefly to this morning.

"That phrase has been unanimously construed by the courts dealing with it as comprehending the cornerstone of our common law tradition—the right of a litigant to a fair and impartial trial before a jury untainted by prejudice and unexposed to improper and undue influence.

"I say to your Honor with great sincerity that we feel that, on the record made here, Panhandle has shown that it cannot obtain a fair jury trial in this jurisdiction.

"Panhandle has been bringing gas into Michigan for about twenty years, and throughout that period there has been, against Panhandle, conducted by Michigan Consolidated and others, a well-conceived, cunningly-devised and excellently-executed, plan to inflame the public mind against Panhandle. That campaign has been carried on incessantly, almost day by day, and certainly week by week, and month by month, with the help of the newspapers; of public bodies, such as the Chamber of Commerce; of public officials, from the Governor of the State down, including the United States Senators and United States Congressmen; the State officials; and any number of officials of cities, towns, villages, and townships in this State." (Transcript, Sept. 29, 1958, pp. 5-6.)

This then is the thrust of defendant's argument, that because of alleged prejudice on the part of the jurors-to-be, the "interest of justice" requires that there be a change of venue. This is a reason in a non-practical area and we shall deal with it after a summary disposition of the practical considerations. In relation to the convenience of parties and to the convenience of witnesses, it is the Court's opinion that a transfer is not proper. If the convenience of defendant would be better served by such transfer, it would be proportionally disserved from the viewpoint of plaintiff. It might also be noted that the area with which

the lawsuit is concerned is this area, not Kansas City. The damages here sought for failure to sell to Consolidated relate to natural gas that allegedly should have been available for consumption in this area, not in Kansas City. Therefore, by all traditional standards of "locus" (place where the tort occurred, place where contract was made or was to be performed) this action is properly in Michigan. From the pleadings, affidavits, exhibits and argument before the Court, the Court is of the opinion that the convenience of the parties and the convenience of the witnesses would not be better served by the requested transfer.

We now reach the contention of defendant that an impartial jury would not be available in this District and Division. Defendant has filed herein a document of substantial bulk entitled "Exhibit to Affidavit of Frederick H. Robinson filed in Support of Defendant's Motion for Change of Venue dated March 12, 1958." It consists of approximately 123 pages. Each page contains a process copy of one or more items from newspapers in the Detroit area. For convenience we will refer to each item as a clipping. The contents of the clippings are variable in length. Some are complete articles. Some are small news items of a few lines. Some appear in the editorial column. Each clipping deals with one or both parties present in this litigation and or with subject matter involving one or both. The 3 major Detroit dailies are represented, as well as local papers of suburban and nearby non-suburban areas. The period of time encompassed by the clippings commences with the year 1952. The latest year to appear is 1958. A brief filed subsequent to the hearing of this motion contains a clipping (copy) from a Detroit newspaper dated October 17, 1958. It is, therefore, quite apparent that the business of defendant in this area is one which the local newspapers deem to be of public interest. More than a few of the clippings contain matter whose source is stated to be that of the mayor of a nearby municipality whose

reputation for fiery words is well known in this entire area. Many of the clippings set forth the contentions of the two parties to the particular feud in progress at the time the newspapers carried the account set forth. A reading of this exhibit followed by some reflection on it does not present quite the picture outlined so graphically by defendant's counsel. The reportorial writings do no more than indicate the views of the parties involved in each of the particular controversies as they have arisen over the last seven or eight years. The matters involved in the newspaper reports are not related to the instant cause of action in any way that would give readers a predisposition on any issue here present. As a matter of fact, in view of the absence of an answer from defendant, it is not now even possible to know that there is any factual question here present. The complaint sets forth allegations as to violations of tariff schedules and of the Natural Gas Act. These allegations may possibly reduce themselves to questions of law. In this posture of the case we can only state that such a possibility does not appear to be remote.

The over-all picture, as gleaned by the Court from its viewing of the clippings Exhibit, is not one that redounds to the prejudice of defendant. There are uncomplimentary remarks about each participant in the various incidents related in the clippings. To say that the appearance of these articles in the local newspapers over a period of years necessarily, or even possibly, would produce a population of citizens in the affected area who are all personally prejudiced against defendant because of an indoctrinated belief that Panhandle's success in this litigation would mean personal doom to them, is to indulge in fantasy. This is not the "interest of justice" concept that was intended to be furthered by § 1404(a). It should be noted that the population of metropolitan Detroit*, as of the City's 1956 estimate, is 3,670,000; that the Eastern District, Southern Division,

* Wayne, Oakland and Macomb Counties.

embraces 11 counties with a total population of 4,162,700 (July, 1957). Many of the counties are not served by plaintiff. The population of such counties would, therefore, be in no position to be personally concerned with the price charged by Consolidated for consumers' gas. There is no prohibition against calling jurors from such counties.

In the event it should develope that the possibility of prejudice existed, the Court could easily consider empanelling jurors from areas certain to be immune from alleged contamination by the local press, because of their freedom from personal impact from the ups and downs of the litigious maneuvers, both legally and administratively, of the parties presently before the Court.

The case will remain here, and an appropriate order may be presented.

Dated at Detroit, Michigan, this 6th day of April, A. D. 1959.

THOMAS P. THORNTON
United States District Judge

A TRUE COPY
JOHN J. GINTHER, *Clerk*
By s/ KATHLEEN FARNSWORTH
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHIGAN CONSOLIDATED GAS COMPANY,
a Michigan corporation, *Plaintiff*,

v.

PANHANDLE EASTERN PIPE LINE COMPANY,
a Delaware corporation, *Defendant*.

Civil Action No. 17-703

Order Denying Motion for Change of Venue

At a session of said Court held in the Federal Building in the City of Detroit, Michigan, this 14th day of April, 1959.

PRESENT: HON. THOMAS P. THORNTON, *District Judge*

This matter having come on to be heard upon the Motion of defendant for an Order transferring the venue of this action from this Court to the District Court of the United States for the Western District of Missouri, Western Division; and the Court having duly considered said Motion together with the pleadings, affidavits, and exhibits, the argument before the Court, and the briefs filed by the parties; and the Court, being fully advised in the premises, having on April 6, 1959, filed its Memorandum Opinion that said Motion should be denied.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the Motion of defendant for an Order transferring the venue of this action from this Court to the

District Court of the United States for the Western District of Missouri, Western Division is hereby denied.

THOMAS P. THORNTON
District Judge

As to form,
Approved for entry:

BODMAN, LONGLEY, BOGLE, ARMSTRONG & DAHLING
Attorneys for Panhandle Eastern Pipe Line Co.
1400 Buhl Building
Detroit 26, Michigan

A TRUE COPY
JOHN J. GINTHER, *Clerk*

By s KATHLEEN FARNSWORTH
Deputy Clerk

STATUTES INVOLVED

The pertinent provisions of Title 28, U. S. Code, are set forth herein as follows:

Section 1292(a). "The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

"(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

"(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed;

"(4) Judgments in civil actions for patent infringement which are final except for accounting."

Section 1292(b). "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district

court unless the district judge or the Court of Appeals or a judge thereof shall so order."

Section 1401(a). "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Section 1651(a). "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."